Supreme Court, U.S.
FILED
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No. 04-1263

IN THE

Supreme Court of the United States

JACK KENNETH BOYD,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Pursuant to the federal Sentencing Guidelines, petitioner's sentence for conspiring to possess methamphetamine with intent to distribute it, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A), was enhanced based on two findings by the district court—that petitioner possessed a firearm during the commission of the charged offense, and that his non-operational methamphetamine laboratory created a substantial risk of harm to the environment. Those facts were neither proven beyond a reasonable doubt to a jury nor admitted by petitioner.

The question presented is whether petitioner's sentence is inconsistent with the Sixth Amendment to the United States Constitution as construed in *United States* v. *Booker*, 125 S. Ct. 738 (2005).

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Jack Kenneth Boyd was defendant-appellant in the court of appeals. The United States of America was plaintiff-appellee.

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IN THE

Supreme Court of the United States

JACK KENNETH BOYD,
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v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Jack Kenneth Boyd respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fifth Circuit, *United States* v. *Jack Kenneth Boyd*, No. 03-11083 (filed December 17, 2004) (avail. 2004 WL 2980272), is reproduced at App., *infra*, 1a-2a. The judgment of the United States District Court for the Northern District of Texas, No. 3:02-CR-235-H (02) (filed October 9, 2003), is reproduced at App., *infra*, 3a-6a. A transcript of the sentencing proceeding is reproduced at App., *infra*, 7a-13a.

JURISDICTION

The decision of the court of appeals was entered on December 17, 2004. App., *infra*, 1a-2a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions are set forth in an appendix to this petition. App., *infra*, 14a-17a.

STATEMENT

Petitioner Jack Kenneth Boyd pleaded guilty in the United States District Court for the Northern District of Texas to one count of conspiracy to possess methamphetamine with intent to distribute it, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A). He was sentenced to 262 months in prison, to be followed by five years of supervised release. On December 17, 2004, the United States Court of Appeals for the Fifth Circuit summarily affirmed petitioner's sentence, rejecting his constitutional challenge to the federal Sentencing Guidelines. Shortly after the court of appeals issued its judgment, this Court decided *United States* v. *Booker*, 125 S. Ct. 738 (2005).

1. On July 19, 2002, during a search of petitioner's farm, federal and local law enforcement officials seized chemicals and other items related to the manufacture of methamphetamine. Petitioner later pleaded guilty to one count of conspiracy to possess methamphetamine with intent to distribute it. *See* 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A).

By pleading guilty, petitioner admitted that he had agreed with others to manufacture and possess methamphetamine (a Schedule II Controlled Substance) with an intent to distribute it; that he knew of the unlawful purpose of the agreement; that he joined in the agree-

ment willfully and with the intent of furthering its unlawful purpose; and that the amount of methamphetamine at issue exceeded 500 grams. *See* R. at 24. Petitioner did not plead guilty to or otherwise admit to possessing a firearm or other dangerous weapon. Nor did he admit that the items found on his property created a substantial risk of harm to the environment.

2. On October 9, 2003, petitioner was sentenced pursuant to the Sentencing Guidelines. The presentence report ("PSR") prepared by the probation officer recommended a two-level increase in petitioner's offense level because dangerous weapons were allegedly found on petitioner's property. It also recommended an additional three-level enhancement based on a finding that the methamphetamine laboratory, despite being non-operational, created "a substantial risk of harm to the environment." *See* PSR 5, ¶¶ 25, 26. Those enhancements are defined as "Specific Offense Characteristics" by the Sentencing Guidelines. *See* U.S.S.G. § 2D1.1(b). At the time petitioner was sentenced, the enhancements were mandatory once established by a preponderance of the evidence, even though they were not proved to a jury beyond a reasonable doubt or admitted by the defendant.

The presentence report also recommended a three-level reduction in petitioner's offense level because petitioner had accepted responsibility for his actions and had timely notified the United States Attorney's Office of his intent to plead guilty and waive his right to a jury trial. PSR 5, ¶¶ 21, 22; *see also* U.S.S.G. §§ 3E1.1(a), (b). The trial judge accepted the presentence report's recommendations and granted the Government's motion for an additional two-level downward departure for petitioner's substantial assistance to the government. *See* App., *infra*, 8a (Tr. 2). Based on the resulting offense level of 34 and a Criminal History Category of VI, petitioner's guidelines range was between 262 and 327 months of

incarceration. The district court sentenced petitioner to 262 months. *Id.*

3. The court of appeals summarily affirmed. The court rejected petitioner's contention that the enhancements to his sentence under the Sentencing Guidelines violated the Sixth Amendment as construed by this Court in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), and *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). The court of appeals did not dispute that, following *Apprendi* and *Blakely*, many courts of appeals had held the Sentencing Guidelines unconstitutional. But the court of appeals followed its earlier decision in *United States* v. *Pineiro*, 377 F.3d 464 (5th Cir. 2004), which upheld the Sentencing Guidelines against such challenges. Petitioner, the court stated, "raises arguments that are foreclosed by *United States* v. *Pineiro*, * * * which held that *Blakely* v. *Washington*, * * * does not apply to the United States Sentencing Guidelines." App., *infra*, 1a.

Approximately one month after the court of appeals issued its judgment, this Court issued its decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005), holding that *Apprendi* and *Blakely* do apply to the Sentencing Guidelines. About two weeks later, this Court granted the petition for a writ of certiorari in *Pineiro*—the decision on which the court of appeals had relied in affirming below—vacating the *Pineiro* judgment, and remanding the case for reconsideration in light of *Booker*. *See* 125 S. Ct. 1003 (2005) (No. 04-5263).

REASONS FOR GRANTING THE PETITION

Applying the Sentencing Guidelines, the district court in this case substantially increased petitioner's sentence based on facts neither proved to a jury beyond a reasonable doubt nor admitted by petitioner, but instead found by a preponderance of the evidence by the trial court itself. In particular, the trial court found that

petitioner had possessed a firearm and that petitioner's non-operational methamphetamine lab created an environmental hazard. After the court of appeals affirmed petitioner's sentence and rejected his constitutional challenge to the Sentencing Guidelines, this Court decided *United States* v. *Booker*, 125 S. Ct. 738 (2005). *Booker* makes clear that the Sixth Amendment's jury-trial guarantee and the requirement of proof beyond a reasonable doubt apply to any factual finding (other than the fact of a prior conviction) used to increase the penalty beyond the otherwise permissible maximum. Petitioner's sentence and the court of appeals' decision in this case are inconsistent with that intervening decision. Accordingly, the Court should grant the petition, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker*.

A. Petitioner's Sentence Is Inconsistent With This Court's Decision In *Booker*

In *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), this Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Four years later, in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), the Court relied on *Apprendi* to hold that a sentence imposed under the Washington Sentencing Reform Act, Wash. Rev. Code § 9.94A *et seq.* (2000), violated the Sixth Amendment, because it permitted the imposition of sentences greater than the standard maximum term based on facts found by the court rather than a jury. The Court rejected the State's contention that the "statutory maximum" was not the standard guidelines term, but rather the ten-year maximum set forth elsewhere in the State's criminal laws. "[T]he relevant 'statutory maximum,'" the Court stated, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum

he may impose *without* any additional findings." *Blakely*, 124 S. Ct. at 2537 (emphasis in original).

Most recently, in *Booker*, this Court held that those same principles apply to the federal Sentencing Guidelines and render their application unconstitutional. In that case, respondent Booker's sentence was increased by approximately nine years above the otherwise applicable guidelines range because the trial court concluded that Booker had possessed a total of 566 grams of crack cocaine (even though the jury had heard evidence of only 92.5 grams) and that Booker had attempted to obstruct justice. 125 S. Ct. at 751. The Court rejected the government's claim that judges may make factual findings that have the effect of increasing the legally permissible sentence. The Court explained that, under *Blakely*, the defendant has a "right to have the jury find the existence of 'any particular fact'" that "the law makes essential to his punishment." 125 S. Ct. at 746 (quoting *Blakely*, 124 S. Ct. at 2536). "That right is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'" *Id.*

The Court found no difference between the state sentencing mechanism held unconstitutional in *Blakely* and the federal Sentencing Guidelines before it in *Booker*: "There is no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines * * * ." 125 S. Ct. at 751. Reaffirming the reasoning and result in *Blakely*, the Court also stated that the Sixth Amendment is violated any time the trial court makes findings that increase the maximum sentence, even if that maximum is reflected in binding "guidelines" rather than a legislative enactment: "Our precedents * * * make clear that the [relevant] 'statutory maximum' * * * is the maximum sentence a

judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 125 S. Ct. at 749 (internal citation omitted) (emphasis in original).

Blakely and *Booker* control this case. As in those cases, the sentencing judge here increased the lawful penalty beyond the otherwise permissible range based on factual findings that were not proved to a jury beyond a reasonable doubt and were never admitted by petitioner. Based on its finding that petitioner was in possession of a dangerous weapon while manufacturing methamphetamine and that his clandestine (but non-operational) lab caused a substantial risk of harm to the environment, the court added a total of five levels to petitioner's base offense level. *See* PSR 5, ¶¶ 25, 26; *see also* U.S.S.G. § 2D1.1(c)(3).[1] Absent those enhancements, petitioner's sentence could have been as much as 111 months (more than nine years) shorter—a significant amount of time by any measure.[2]

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[1] Five offense levels were eventually subtracted for acceptance of responsibility and substantial cooperation with law enforcement officials. *See* PSR 5, ¶¶ 21, 22. No one, however, has challenged the reductions, and the fact that the enhancements were offset by corresponding reductions does not alter the fact that the enhancements were unconstitutional in the first place. *Booker* makes clear that *any* fact used to increase a sentence beyond the otherwise applicable range must be found beyond a reasonable doubt by a jury. The trial court, moreover, nowhere suggested that it would reach the same result if the Sentencing Guidelines were not mandatory.

[2] Once the district court determined, as it did in this case, that the defendant clearly accepted responsibility for his actions and timely notified authorities of his intent to enter a plea agreement, the maximum sentence the court could have imposed would have been 188-235 months based on an offense level of 31, substantially less than the 262-month sentence petitioner received. *See* U.S.S.G. Ch. 5, Pt. A (sentencing table). Moreover, should the Government's Motion for Downward Departure be made and approved again—and there is

In summarily affirming the district court's judgment, the court of appeals held that petitioner's "arguments * * * are foreclosed by *United States* v. *Pineiro*, * * * which held that *Blakely* v. *Washington*, * * * does not apply to the United States Sentencing Guidelines." App., *infra*, 1a. However, one month after the court of appeals decided this case, this Court's decision in *Booker* squarely held that "the Sixth Amendment as construed in *Blakely does apply* to the Sentencing Guidelines." 125 S. Ct. at 746 (emphasis added). The decision below thus rests on a false premise and cannot stand. Indeed, just two weeks after *Booker* was decided, this Court granted the petition for a writ of certiorari in *Pineiro*, vacated the Fifth Circuit's judgment, and remanded the case for reconsideration in light of *Booker*. *See* 125 S. Ct. 1003 (2005) (No. 04-5263). The same result is appropriate here.

B. The Court Should Grant The Petition, Vacate The Court Of Appeals' Judgment, And Remand The Case For Further Consideration In Light of *Booker*

Where an intervening decision of this Court changes a question of federal law upon which a lower court decision is predicated, this Court customarily grants the petition, vacates the judgment below, and remands to the lower court (GVR). *Sarr* v. *Wyoming*, 125 S. Ct. 297 (2004); *Robinson* v. *Story*, 469 U.S. 1081 (1984); *Lawrence* v. *Chater*, 516 U.S. 163, 180 (1996) (Scalia, J., dissenting) ("By 1945, we could state that it was '[a] customary procedure' for the Court 'to vacate the judgment of [a] state court where there has been a supervening event since its rendition which alters the basis upon which the

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no reason to assume the contrary—petitioner's offense level would be further reduced to 29, resulting in a sentencing range of 151-188 months. *Id.*

judgment rests, and to remand the case so that the court from which it came might reconsider the question in light of the changed circumstances.'") (quoting *State Farm Mut. Automobile Ins. Co.* v. *Duel*, 324 U.S. 154, 161 (1945)).

The same course is warranted here. While the court of appeals in this case affirmed on the premise that the Court's decision in *Blakely* did not apply to the federal Sentencing Guidelines, this Court's decision in *Booker* establishes the contrary. *Booker*, moreover, holds that "the Court's remedial interpretation of the Sentencing Act must be applied to all cases on direct review." 125 S. Ct. at 745 (internal citation omitted). Because the intervening decision in *Booker* does not merely bear strongly on, but will "determine the ultimate outcome" on redetermination in this case, a GVR is appropriate. *Chater*, 516 U.S. at 167. Indeed, since *Booker* was decided on January 12, 2005, this Court has issued GVR orders in light of *Booker* in at least 88 cases from the Fifth Circuit.[3]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of this Court's decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005).

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[3] *See, e.g.*, *Pineiro*, 125 S. Ct. 1003 (2005) (No. 04-5263); *Nguyen* v. *United States*, 2005 WL 166721 (U.S. Feb. 28, 2005) (No. 04-8296); *Edwards* v. *United States*, 2005 WL 43670 (U.S. Feb. 28, 2005) (No. 04-8065).

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-11083
Conference Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JACK KENNETH BOYD,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:02-CR-235-2-H

[December 17, 2004]

Before KING, Chief Judge, and DEMOSS and CLEMENT, Circuit Judges.

PER CURIAM:

Appealing the Judgment in a Criminal Case, Jack Kenneth Boyd raises arguments that are foreclosed by *United States* v. *Pineiro*, 377 F.3d 464, 465-66 (5th Cir. 2004), *petition for cert. filed* (U.S. July 14, 2004) (No. 04-5263), which held that *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), does not apply to the United States Sentencing Guidelines. The Government's motion for sum-

mary affirmance is GRANTED, and the judgment of the district court is AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

ORIGINAL

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT - 9 2003
CLERK, U.S. DISTRICT COURT
By _____ Deputy

United States District Court

Northern District of Texas
Dallas Division

UNITED STATES OF AMERICA

v. Case Number 3:02-CR-235-H (02)

JACK KENNETH BOYD
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JACK KENNETH BOYD, was represented by Phillip A. Linder.

On motion of the United States, the Court has dismissed the remaining Counts of the Indictment filed on August 7, 2002, as to this defendant only.

The defendant pleaded guilty to Count 1 of the Indictment filed on August 7, 2002. Accordingly, the defendant is adjudged guilty of such Count, involving the following offense:

Title & Section	Nature of Offense	Date of Offense	Count Number
21 USC § 846	Conspiracy to Manufacture and to Possess With Intent to Distribute and to Distribute in Excess of 500 Grams of Methamphetamine, a Scheduled II Controlled Substance	July 19, 2002	1

As pronounced on October 9, 2003, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 9 day of October, 2003.

BAREFOOT SANDERS
SENIOR UNITED STATES DISTRICT JUDGE

Defendant's SSN: 452-29-8774
Defendant's Date of Birth: 3/2/60
Defendant's Address: Federal Detention Center, 2113 North Highway 175, Seagoville, Texas 75159
Defendant's USM No: 28498-177

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TWO HUNDRED-SIXTY TWO (262)** months.

The Court makes the following recommendations to the Bureau of Prisons: The defendant requests incarceration at FCI Seagoville, Seagoville, Texas, to be near his family; the Court so recommends.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: JACK KENNETH BOYD
Case Number: 3:02-CR-235-H (02)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

The defendant shall provide to the U.S. Probation Officer any requested financial information.

The defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (co-payment) at a rate of at least $10.00 per month.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

versus

JACK KENNETH BOYD

Case No. 3:02-CR-235-H

October 9, 2003

BEFORE THE HONORABLE BAREFOOT SANDERS,
UNITED STATES SENIOR DISTRICT JUDGE

TRANSCRIPT OF SENTENCING

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* * * * *

[1] THE COURT: The next case on the docket for sentencing is CR-235, the United States versus Jack Kenneth Boyd.

And, Mr. Linder, are you ready to proceed?

MR. LINDER: Yes, Your Honor.

THE COURT: And I notice that Ms. Etessam is ready to proceed for the government.

MS. ETESSAM: Yes, Your Honor.

THE COURT: Are you Mr. Boyd?

THE DEFENDANT: Yes, sir.

THE COURT: Come up where you're with your lawyer, will you please, sir.

Now, you are Jack Kenneth Boyd; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you are represented here by Mr. Linder; is that right?

THE DEFENDANT: Yes, sir.

THE COURT: I have before me the presentence report which I've reviewed.

It's obvious that from the objections filed that Mr. Linder has carefully reviewed that.

I have before me also a 5K1 filed by the government.

Based on the presentence report, with some corrections to it, the government came up with a total offense level of [2] 36 and a criminal history category of VI for a guideline range of 324 to 405 months.

The government recommends a downward departure of two points, which I will grant, which takes us down to 34 and VI, a range of 262 to 327 months.

Now then, with respect to the objections filed, I've reviewed those objections, Mr. Linder, and I've also reviewed an addendum which you've brought in to me to the objections; and while I'll accept oral argument on it, I don't really see any point in doing so unless you insist on it. I overrule all those objections.

There was one of your objections to paragraph 40. I accept that for the reasons stated. And that is factored into the—what I've already had to say about the range. That does not change the guideline calculations.

I'll accept in part the objection to paragraph 42 for the reasons stated by probation, and the same ruling with respect to paragraph 45. Neither changes the calcu-

lations for the sentencing range. And that's explained in the presentence report and the addendum filed by the probation office.

So, having granted the 5K1 and ruling as I have, I'm looking at a sentencing range, as I stated, of 262 to 327. And that also includes my review of the addendum which you have furnished me with.

[3] So I'll be sentencing within that range. And I'll be glad to hear from you and Mr. Boyd before I sentence.

MR. LINDER: Judge, would you like to hear from Mr. Boyd first or me?

THE COURT: I'll do it either way.

Why don't we hear from him first?

MR. LINDER: I would like to call Mr. Boyd.

THE COURT: Mr. Boyd, please raise your right hand and take the oath.

JACK KENNETH BOYD, DEFENDANT, SWORN

THE COURT: All right, sir.

THE DEFENDANT: Judge Sanders, I've made some terrible mistakes and I would like to apologize. I would like to apologize to my dad. He raised me better than—better—to know better than the things that I've done.

And I've tried to help Agent Walker and 'em with whatever they've asked me to do, and I fully intend on helping 'em all as much as they will allow me to.

And that's about it, Your Honor.

THE COURT: Mr. Linder.

Thank you, sir.

MR. LINDER: Can I call his father?

THE COURT: Yes.

MR. LINDER: His father is Jack Boyd, Sr.

THE COURT: All right, sir. I'll be glad to hear [4] from you.

State your name and tell me what you wish to say.

THE WITNESS: I'm Jack G. Boyd, Jack Kenneth Boyd's father. And I just want to say: He's not a bad person. He screwed up. And I appreciate anything you can do for him.

THE COURT: All right, sir. Well, I appreciate you coming today. Thank you.

Mr. Linder.

Mr. Boyd, do you want to go back with him?

MR. LINDER: On Mr. Boyd's behalf, judge, I know, you're aware of his cooperation and assistance with the government, willingness to continue to assist. The—some of the information was used, some of it hasn't been able to be used, but he's indicated his willingness to cooperate from the beginning.

I think his criminal history category at VI, although he's got an extensive criminal record, the majority of it's misdemeanors, driving with suspended licenses, and misdemeanor marijuana, and some misdemeanor DWI, and I think, you know, outside the heartland all of these misdemeanors got him up to a level VI because some of them he could have just plead to a day and it wouldn't have affected him the way it has, and he got 30 day sentences. And I appreciate the fact that the court is granting the [5] government's 5K1. I'd ask for a couple more levels just to show mercy on Mr. Boyd. He's indicated his continued willingness to cooperate with the government. And I'd just appreciate the court's consideration on that.

THE COURT: All right. Thank you, sir.

And do you have anything else you want to say, Mr. Boyd?

THE DEFENDANT: No, sir, Your Honor.

THE COURT: All right. Thank you.

Ms. Etessam, do you have anything you want to say?

MS. ETESSAM: No, sir.

THE COURT: The following will be the court's statement of reasons for sentencing in the case:

I'm sentencing him to custody for a term of 262 months. That's on the basis of a 34 offense level and a category VI. I don't agree that his criminal history is all that negligible, there are some other matters, petty theft and so forth, although a lot of it is minor, I agree.

But at any rate, the sentence is custody for 262 months. That's based on the presentence report and the representations being made here today.

As to the fine and restitution, he has no wherewithal to pay either.

As to supervised release, he's placed on supervised release for a term of five years after his release from [6] custody.

While on supervised release he must not commit another federal, state, or local crime. He must not, must not illegally possess a controlled substance.

Additionally, he must refrain from the unlawful use of an illegal controlled substance. He must submit to one drug test within 15 days of his release and at least two periodic drug tests thereafter as directed by the probation officer.

While on supervised release Mr. Boyd must comply with the standard conditions recommended by the Sentencing Commission and comply with the following additional conditions:

One, he must not possess a firearm.

Second, he must report in person to the probation office in the District to which released within 72 hours of his release.

Third, must provide to the probation officer any requested financial information.

Fourth, must participate in a program approved by the probation office for the treatment of any narcotic drug or alcohol dependency, and that may include testing for substance use or substance abuse. He must abstain from the use of alcohol and any other intoxicants during this period of time.

And he must contribute to the costs of those services [7] at the rate of $10 a month, at least.

The law provides and I hereby levy a special assessment of $100.

And that will be the sentence of the court.

The sentence is on count 1. Is there a motion?

MS. ETESSAM: The government moves to dismiss the remaining count as to this defendant, judge.

THE COURT: Granted and dismissed.

Do you have anything else, Mr. Linder?

MR. LINDER: Judge, just, I know it's not controlling, but based on the fact that Mr. Boyd's family is here and there may be future efforts to communicate with Mr. Boyd by the government, if you could make a recommendation that he be sentenced to Seagoville, I know that they can at least look at that, and I'd appreciate a recommendation, Your Honor.

THE COURT: I'll recommend Seagoville. But, as you correctly stated, that's not controlling on the Bureau of Prisons, they get crowded at different places. But I will make that recommendation.

MR. LINDER: Thank you, judge.

THE COURT: Do you have anything else, Mr. Linder?

MR. LINDER: No, sir.

THE COURT: You'll be excused.

Mr. Boyd is remanded to custody at this time.

[8] And that would appear to conclude the criminal docket, right, Ms. Etessam?

MS. ETESSAM: That's right, judge.

THE COURT: The court's in recess.

THE SECURITY OFFICER: All rise.

* * * * *

APPENDIX D

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. Section 846 of Title 21 of the United States Code provides in relevant part:

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

3. Section 841 of Title 21 of the United States Code provides in relevant part:

§ 841. Prohibited acts

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

* * *

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

* * *

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life[,] * * * a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual * * *. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

4. The United States Sentencing Guidelines Manual provides in relevant part:

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

* * *

(3) the offense level specified in the Drug Quantity Table set forth in Subsection (c), except that if the defendant receives an adjustment under § 3B1.2 (Mitigating Role), the base offense level under this subsection shall not be more than level **30**.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

* * *

(5) (Apply the greater):

* * *

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

* * *

(c) DRUG QUANTITY TABLE

Controlled Substance and Quantity	Base Offense Level
* * *	
(3) At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice"	**Level 34**
* * *	

§ 3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

(1) timely providing complete information to the government concerning his own involvement in the offense; or

(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,

decrease the offense level by 1 additional level.

(2)

Supreme Court, U.S.
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No. 04-1263

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JACK KENNETH BOYD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *United States* v. *Booker* and *United States* v. *Fanfan*, 125 S. Ct. 738 (2005). In *Booker* and *Fanfan*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Booker*, 125 S. Ct. at 757-769 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case

for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error.* See *id.* at 769.

PAUL D. CLEMENT
Acting Solicitor General

MARCH 2005

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* The government waives any further response to the petition unless the Court requests otherwise